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SUPREME COURT, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 75-3711

NANETTE LEADING FIGHTER
AND DAVID LEADING FIGHTER,

PETITIONERS,

V.

THE COUNTY OF GREGORY,
A POLITICAL SUBDIVISION OF
THE STATE OF SOUTH DAKOTA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

NANNETTE LEADING FIGHTER
AND DAVID LEADING FIGHTER,

PETITIONERS,

V.

THE COUNTY OF GREGORY,
A POLITICAL SUBDIVISION OF
THE STATE OF SOUTH DAKOTA,

RESPONDENT.

PETITION FOR A WRIT

OF CERTIORARI TO

THE SUPREME COURT OF

THE STATE OF SOUTH DAKOTA

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in this matter on May 9, 1975.

OPINION BELOW

The opinion of the Supreme Court of the State of South Dakota is reported at 230 N.W.2d 114. The judgment of that Court affirming the Circuit Court is unreported, but was entered also on May 9, 1975.

JURISDICTION

The judgment and opinion of the Supreme Court of the State of South Dakota were entered on May 9, 1975. On August 8, 1975 Mr. Justice Blackmun signed an order extending the time for filing this Petition for a Writ of Certiorari to and including September 8, 1975. The jurisdiction of

28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. May the neglect of the Secretary of the Interior to comply with that part of 25 U.S.C. §409a directed at him be imputed to an Indian allottee to strip him of his vested right to a tax exemption for his trust allotment, as guaranteed to him by another part of that same statute?

2. Does the prudent conversion of the form of an Indian trust asset by the trustee United States strip that trust asset of its trust character?

3. Must petitioner bear the burden of proof as to lack of his consent to the loss of the tax exemption for his trust asset, despite 25 U.S.C. §194 (Act of June 30, 1834; 4 Stat. 733)?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Code, Title 25

§409a. Whenever any non-taxable land of a restricted Indian of the Five Civilized Tribes or of any other Indian tribe is sold to any State, county, or municipality for public-improvement purposes, or is acquired, under existing law, by any State, county, or municipality by condemnation or other proceedings for such public purposes, or is sold under existing law to any other person or corporation for other purposes, the money received for said land may, in the discretion and with the approval of the Secretary of the Interior, be reinvested in other lands selected by said Indian, and such land so selected and purchased shall be restricted as to alienation, lease, or incumbrance, and nontaxable in the same quantity and upon the same terms and

conditions as the nontaxable lands from which the reinvested funds were derived, and such restrictions shall appear in the conveyance.

STATEMENT OF THE CASE

Petitioners Nannette Leading Fighter and David Leading Fighter are enrolled members of the Rosebud Sioux Tribe of Indians.[1] On May 13, 1913 Nannette Leading Fighter received an original allotment of trust land on the Rosebud Sioux Indian Reservation from the United States. The United States held this parcel of remote and unimproved grazing land in trust for her until 1960 when Nannette wished to

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1. Counsel for Petitioners have been informed that Nannette Leading Fighter died during the pendency of this matter. She was over 70 years old. She is survived by her husband David Leading Fighter who presumably will receive her interest and chose in action for the subject property by intestacy at the completion of the probate. They will be referred to as "petitioners" herein for the sake of continuity of nomenclature.

exchange this parcel of trust land for a lot in the town of Herrick on which was located a modest home in which Nannette hoped to spend her declining years. This lot was located off the reservation, at least for purposes of this proceeding.

In reply to her request for this exchange of land, the United States sold Nannette's original allotment on April 6, 1960 for $4400 and deposited this sum directly into her Individual Indian Money Account at the Rosebud Agency of the Bureau of Indian Affairs. Shortly thereafter, on June 24, 1960, the United States used $1300 of the sale proceeds to purchase the desired lot and home for Nannette, retaining the balance in her account at the agency. The basis of the transaction was a form agreement by which the vendor, one Avery H. Webster, would furnish an abstract of title and deed to the lot to Nannette, who authorized the superintendent of the

Rosebud Agency to withdraw the $1300 purchase price from her account. The conveyance was approved by the superintendant, and Webster conveyed the lot to Nannette and her son Nicodemus Leading Fighter by warranty deed. However, for unknown reasons, no restrictions appeared on this conveyance, nor was there any mention of the continuing trust status of this trust asset in the deed, despite the requirement in 25 U.S.C. §409a that such restrictions appear on the face of the conveyance.

This substitute realty was taxable by Gregory County, South Dakota, in which it is located, prior to its conveyance to Nannette. The record contains no evidence at all as to whether Nannette ever consented to the loss of the tax immunity attending her trust corpus, or even if she was aware that it existed. However,

Gregory County continued to levy taxes on the substitute lot. Nannette was so impoverished that she could not pay the taxes, and the county sold the lot and home for taxes.

While the county was seeking to tax her lot and home, Nannette sought the aid of South Dakota Legal Services. That program filed suit on her behalf in Circuit Court, seeking a declaration that the substitute lands were non-taxable and an alternative writ of prohibition to restrain the tax sale until the merits of the case could be determined. The writ issued and trial on the merits occurred at which Nannette claimed that her substitute lot was non-taxable for the following reasons, all of which appear in her trial brief:

1. Since the substitute lot was purchased with the proceeds of the sale of a trust asset, it, too, was as exempt from

taxation as was the original trust allotment, because the mere conversion of the form of a trust asset does not end the trust character of that asset as long as the trust property is clearly traceable and identifiable. Ward v. U.S., 139 F.2d 79, 82 (10th Cir., 1943); U.S. v. Willaims, 139 F.2d 83, 85 (10th Cir., 1943); Republic Supply Co. of Cal. v.Richfield Oil Co., 79 F.2d 375, 377 (9th Cir., 1935); U.S. v. Thurston County, Neb., 143 F. 287 (8th Cir., 1906); etc.

2. Nannette's substitute lot was a federal instrumentality, and thus beyond the taxing power of the state. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); U.S. v. Rickert, 188 U.S. 432 (1903); U.S. v. Dewey County, S.D., 26 F.2d 434 (8th Cir., 1928), etc.

3. Congress had guaranteed immunity from state taxation for lands such as Nannette's in 25 U.S.C. §409a.

The trial court rejected all of these federal arguments, in addition to two others based on state law. The Circuit Court simply ruled that the requirements of 25 U.S.C.§409a had not been met because the trust status of the substitute land was not evident from the conveyance. The court equated the transaction with the issuance of a fee patent to Nannette, under 25 U.S.C. §349. It did not pass on the first two theories mentioned in Nannette's trial brief.

On appeal, Nannette assigned as error each of the claims advanced in her trial brief. In addition to these federal claims, Nannette added two other federal claims in her brief on the merits in the South Dakota Supreme Court. Those new claims were:

1. That her substitute lot was immune from taxation by operation of 25 U.S.C. §§464-465.

2. That Gregory County had deprived

her of her vested right to a tax exemption, contrary to the Fifth and Fourteenth Amendments to the United States Constitution. The case law upon which she based this theory will be found infra in Part I of "Reasons for Granting the Writ".

The South Dakota Supreme Court rejected each of these federal arguments. It held that the requirements of 25 U.S.C. §409a had not been met because the action of the Secretary of the Interior in recording restrictions on the conveyance was supposedly a condition precedent to the operation of the other part of the statute which would have rendered the substitute land non-taxable. Also held to be inapplicable were 25 U.S.C. §464-465 and 25 U.S.C. §194. And the Court disposed of the conversion of the form of the corpus of the trust theory with citation to Trotter v. Tennessee, 290 U.S. 354 (1933)

and Lawrence v. Shaw, 300 U.S. 245 (1937). However, there was a vigorous dissent from the views of the majority by Justice Winans, whose lengthy dissenting opinion rejects each of the cavils of the majority and endorses nearly every one of Nannette's federal arguments.

REASONS FOR GRANTING THE PETITION

I

THE DECISION OF THE SOUTH DAKOTA SUPREME COURT IS IN CONFLICT WITH THE DECISIONS OF THIS AND OTHER FEDERAL COURTS REGARDING THE CIRCUMSTANCES UNDER WHICH AN INDIAN MAY LOSE HIS VESTED RIGHT TO A TAX EXEMPTION FOR LANDS SUBSTITUTED FOR HIS TRUST ALLOTMENT.

A divided South Dakota Supreme Court held that the failure of the Secretary of the Interior to make explicit the trust status of petitioner's substitute realty on the face of the conveyance, as required by 25 U.S.C. §409a[1], stripped the substitute lands of their tax exemption. (230 N.W. 2d at 117-118). This decision flies in the face of the law of this and other federal courts concerning the circumstances under which an Indian may loose his vested right to a tax exemption for his trust allotment. The tax exemption persists by force of the

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1. Act of March 2, 1931, 46 Stat. 1471: "restrictions shall appear in the conveyance" of such substitute lands.

federal law of Indian trusts, and by statute. The applicable federal law is discussed in the vigorous dissent of Justice Winans and is summarized below.

This Court has held that an Indian receives more than just a parcel of land to be held in trust when he receives an allotment. He also receives a tax exemption for that land. United States v. Rickert, 188 U.S. 432, 441 (1903); Glacier County, Montana v. United States, 99 F.2d 733, 734 (9th Cir., 1938). This right to a tax exemption is vested and protected by the Fifth Amendment against being taken. Choate v. Trapp, 224 U.S. 665, 673-674 (1912). The United States may not unilaterally divest the Indian allottee of this vested right to an exemption; the consent of the Indian is also required. Mahnomen County, Minnesota v. United States, 319 U.S. 474, 476-477 (1943).

In its management of Indian trust allotments, the United States is held to the

same standard of care as an ordinary private trustee. Unites States v. Mason, 412 U.S. 391 (1973). This duty contemplates the transformation of the corpus of the trust from one form of property to another, if such action is prudent and advantageous to the beneficiary. Menominee Tribe of Indians v. United States, 101 Ct. Cls. 10, 21 (1944); United States v. Goldfeder, 112 F.2d 615, 616-617 (10th Cir. 1940). Throughout such beneficial transmutation, the corpus retains its trust status as long as it is clearly identifiable and traceable. This rule has been applied in a factually indistinguishable case:

> In substance, there was a mere conversion of trust property. The restricted allotment was converted into funds and the funds were converted into land. Such land was charged with the same trust as the original allotment, under the well-settled principle of the law of trusts that, whenever property in its original state and form has once been impressed with a trust, no

> change of that state and form can divest it of its trust character, so long as it remains capable of clear identification. Ward v. United States, 139 F.2d 79, 82 (10th Cir., 1943)

See also National Bank v. Conn. Mut. Life Ins. Co., 104 U.S. 54, 67 (1881); Cook v. Tullis, 85 U.S. 332, 341, 342 (1874); United States v. Thurston County, Nebraska, 143 F. 287, 292 (8th Cir., 1906). The incidents of the trust, such as the vested tax exemption, attach to whatever identifiable form of property into which the trustee may transform the original corpus. Fink v. Muskogee County, Oklahoma, 248 U.S. 399, 403-404 (1919); Mott v. United States, 283 U.S. 747, 752 (1931).

Petitioner's substitute realty was therefore impressed with the same trust as the original allotment. The attendant tax exemption for it was a vested right which could be lost only with the Indian's consent. The county had the burden of overcoming the presumption of non-taxability for the substitute realty. 25 U.S.C. §194. Since the

county offered nothing to overcome this presumption, the tax exemption for the substitute parcel was never lost. The county deprived petitioner of a vested right to a tax exemption by taxing the substitute realty.

Congress recognized and codified this transmutability of the form of an Indian trust allotment, in 25 U.S.C. §409a, which provides in pertinent part that

> Whenever any nontaxable land of a restricted Indian ... is sold under existing law to any other person ... for other purposes, the money received for the said land may, in the discretion and with the approval of the Secretary of the Interior, be reinvested in other lands selected by said Indian, and such land so selected and purchased shall be restricted as to alienation, lease, or incumbrance, and nontaxable in the same quantity and upon the same terms and conditions as the nontaxable lands from which the reinvested funds were derived, and such restrictions shall appear in the conveyance.

This statute requires that such substitute

lands "shall be ... nontaxable" to the same extent as were the original. This nontaxability is an independent command of the statute, directed at all those who might seek to tax. The statute also commands the Secretary of the Interior, presumably, to record the trust character of the substitute lands in the conveyance. Each such command is independent of the other. Therefore, the unexplained neglect of the Secretary to obey the statutory command aimed at him should not excuse Gregory County from obeying the statute's independent command aimed at it: that it not tax the substitute lands. As this Court noted in United States v. Hellard, 322 U.S. 363, 366-367 (1944), such substitute "lands are both tax exempt and restricted" by the operation of the statute itself.[2]

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2. The reliance of the South Dakota Supreme Court on Trotter v. Tennessee, 290 U.S. 354 (1933) and Lawrence v. Shaw, 300 U.S. 245 (1937) is misplaced. Both cases dealt with a statutory tax exemption for certain funds, [footnote continued on next page]

Nor should the Secretary's failure to obey that portion of 25 U.S.C. §409a directed at him be imputed to the Indian to defeat his independent tax exemption. See Cramer v. United States, 261 U.S. 219, 234 (1923): Sessions, Inc. v. Morton, 491 F.2d 854, 857, n. 5 (9th Cir., 1974); United States v. Forness, 125 F.2d 928, 932-933 (2nd Cir., 1942, per Jerome Frank).

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which exemption was lost when they were converted into lands. In neither case was there a trust relation between the United States and the claimant, as there is here. Also, 25 U.S.C. §409a refers specifically to lands, the property here in question, while the statute in the other two cases refers only to funds, not the property there in question. Furthermore, the South Dakota Court ignored the final portion of its quotation from Mr. Justice Cardozo in Trotter (230 N.W. 2d at 118) as Justice Winans noted in his dissent (230 N.W. 2d at 122). Mr. Justice Blackmun of this Court has rejected this overly narrow reading of Trotter in Cherry-Burrell Corp. v. United States, 367 F.2d 669, 674 (8th Cir., 1966).

II

THIS CASE PRESENTS THREE NOVEL, UNANSWERED QUESTIONS OF FEDERAL LAW, THE ANSWERS TO WHICH WILL BE OF GREAT SIGNIFICANCE TO INDIANS WHO LEAVE THE RESERVATION TO ENTER THE MAINSTREAM OF CONTEMPORARY SOCIETY.

25 U.S.C. §409a and the trust mechanism noted above provide a vehicle for reservation Indians to leave the reservation and enter the larger society, while still retaining a small parcel of tax exempt land for a homesite, for leasing, etc. This vestigial link to one's Indian heritage will be lost to Indians who elect to leave the reservation if nontaxability cannot be guaranteed. As Justice Winans noted in his strong dissent,

> Such a risk would clearly discourage those Indians who wish to live in the larger society outside the confines of the reservation. This, I believe, was not the intention of Congress in its Indian policy. Nor do I believe this holding to be unfair to the larger society or that it poses any threat to our system of taxation. 230 N.W.2d 122

An Indian's ability to leave the reservation will be fostered if this Court provides answers to the following significant questions of federal Indian law, as yet unanswered by this Court:

1. May the neglect of the Secretary of the Interior to comply with that part of 25 U.S.C. §409a directed at him be imputed to the Indian allottee to strip him of his vested right to a tax exemption, as guaranteed by another part of that same statute?

2. Does the prudent conversion of the form of an Indian trust asset by the trustee United States strip that trust asset of its trust character?

3. Must petitioner bear the burden of proof as to lack of consent from the loss of the tax exemption, despite 25 U.S.C. §194 (Act of June 30, 1834, 4 Stat. 733)?

The South Dakota Supreme Court gave affirmative answers to each of these

questions, misapplying or ignoring the relevant federal law. Unless this Court grants certiorari, these errors will persist, to the detriment of Indians who wish to engage in such transactions, and to the discredit of the federal law intended to protect this aspect of Indian trust status.

CONCLUSION

For the two reasons noted above, the Court should grant the Writ of Certiorari to review the judgment of the Supreme Court of the State of South Dakota.

Respectfully submitted,

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APPENDIX A

Opinion of the South Dakota

Supreme Court

Filed May 9, 1975

NANETTE LEADING FIGHTER and DAVID LEADING FIGHTER, Plaintiffs and Appellants,	NO. 11321
v.	APPEAL FROM THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
THE COUNTY OF GREGORY, A Political Subdivision of The State of South Dakota, Defendant and Respondent.	GREGORY COUNTY, SOUTH DAKOTA

BIEGELMEIR, Justice* (on reassignment).

Plaintiffs' action challenges the tax deed title of defendant county issued by reason of failure to pay the real estate taxes assessed and levied against the lots involved. The facts were not in dispute and are set forth in a stipulation. No

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* Retired Supreme Court Justice acting pursuant to SDCL 16-1-5.

question is raised as to the procedures followed that led to the issuance of the tax deed, except claim is made that the property is exempt from any taxes of the State of South Dakota. The circuit court held that the property was taxable and that the deed to the county was valid; therefore, it entered a judgment dismissing the action.

Nanette Leading Fighter and David Leading Fighter, her husband, are duly enrolled members of the Rosebud Sioux Indian Tribe. Nanette was the original allottee of a parcel of reservation land, the title to which was in the name of the United States as trustee for her. On April 7, 1960, this allotment was sold in due course, and the proceeds of $4,400 were received and held in trust by the United States by depositing the same in her account in the Rosebud Indian Agency. On June 24, 1960, Nanette purchased the lots here involved from Avery H. Webster. An agreement was executed on a Rosebud Indian

Agency form wherein Webster agreed to furnish an abstract of title and a deed conveying the lots to Nanette, and she authorized the Agency Superintendent to make payment to Webster of $1,300 "from money" paid her as her share from the sale of the allotment on deposit in the Agency account. The agreement was approved by an official of the B.I.A. (Bureau of Indian Affairs). Webster then conveyed the four lots he owned to plaintiff Nanette and Nicodemus Leading Fighter, her son, by warranty deed.[1] The lots are in the Town of Herrick, South Dakota, and are not part of any Indian reservation.

Plaintiffs contend that as title to

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1. In the unsatisfactory state of the record, Nicodemus was not made a party to the action and David is not shown to have any title or interest therein; thus, the judgment as to David must be affirmed. However, as the parties refer to "the plaintiffs" as such in their briefs, that term will be used throughout the opinion.

the original allotment[2] to Nanette and the proceeds of the sale of said allotment were held in trust by the United States they were not taxable by the state, and therefore the lots thereafter purchased, as here related, were also tax exempt. The several theories and the statutes, constitutional provisions and decisions cited in support thereof are now examined.

The trial court held that 25 U.S.C.A., §349 did not grant immunity from state taxation even under the argument of plaintiffs that United States v. Glacier County, D.C. Mont., 17 F.Supp. 411, extended such claim to require consent of the allottee to permit state taxation. That section provides:

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2. Title to the original allotment of the land within the Rosebud Indian Reservation was held in trust by the United States for plaintiff Nanette Leading Fighter. As such, it was exempt from state taxation. Ch. 405, 25 Stat. 888; 25 U.S.C.A., §462; Lebo v. Griffith, 42 S.D. 198, 173 N.W. 840. See also United States v. Rickert, 188 U.S. 432, 23 S.Ct. 478, 47 L.Ed. 532.

> "* * * the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed* * *."
> (emphasis supplied)

This section does not apply to the facts shown by this record, as it grants power under certain circumstances to the Secretary to "cause to be issued to such allottee a patent in fee simple * * *." (emphasis supplied) Patents are issued only by sovereign powers (see "Patent--Of Land," 31A Words And Phrases, and "patent," Webster's Third New International Dictionary) and deeds are executed by persons and private corporations. Section 349 is expressly limited to a "patent" to an "allottee" over which the United States or its Secretary of the Interior has certain powers or authority. No such powers or authority exists over a

deed to property executed by a private citizen, and §349 does not purport to grant such authority. Plaintiff Nanette did not acquire title to the Herrick lots by virtue of a patent from the United States, nor was Nanette Leading Fighter an allottee. She was a grantee in a deed from a private citizen to lots outside a reservation for which she paid a valuable consideration--the same as any such transaction. The Glacier County opinion, supra, while not binding on this court, limits its application so as to exclude the consent theory from the transfer of title here.

Assuming that §349, 25 U.S.C.A. applied, some claim is made that §194, 25 U.S.C.A. places the burden of proof to show Nanette's consent to the taxation as expounded in the Glacier County opinion. While that opinion and §349 have been held inapplicable here, §194 places such burden only in "trials about the right of property in which an Indian may be a party on one side, and a white person

on the other* * *." That section and cases cited under it are thus inapposite.

Plaintiffs assert that §§464 and 465, 25 U.S.C.A. grant immunity from taxation. Section 464 states that no exchange of restricted Indian lands shall be made or approved except as provided in §465 and other sections cited therein. These two sections, so far as pertinent here, are:

> §464.
> "Except as provided in sections * * * 464, 465 * * * of this title, no * * * exchange * * * of restricted Indian lands * * * shall be made or approved: * * * Provided further, That the Secretary of the Interior may authorize voluntary exchanges of lands of equal value * * * whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands * * *."
>
> §465.
> "The Secretary of the Interior is hereby authorized * * * to acquire, through * * * exchange, * * * any interest in lands * * * within or

> without existing reservations for the purpose of providing land for Indians.
>
> * * *
>
> "Title to any lands * * * acquired pursuant to sections * * * 464, 465 * * * of this title shall be taken in the name of the United States in trust for the * * * individual Indian for which the land is acquired, and such lands * * * shall be exempt form State and local taxation." (emphasis supplied)

There was no exchange involved here that the Secretary could or did approve, rather, there was an outright sale of land and a later independent purchase of lots--not of equal value and not in the "name of the United States in trust for" Nanette, which §465 requires.

Further, in connection with these and other sections mentioned in this opinion, it appears there were two independent transactions not within the purport of the sections cited by plaintiffs; first, the sale of land by Nanette alone, and later a payment out of the sale proceeds to Webster and the

transfer of the lots to Nanette and Nicodemus, her son, personally. This amounts to a gift or sale of part of the lots to Nicodemus which could not have been done if title had been taken in the name of the United States as required by §465. This transaction was not one permitted or envisioned by these statutes.

It is further argued that the lots are tax exempt under 25 U.S.C.A., §409a.[3]

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3. "Whenever any non taxable land of a restricted Indian of the Five Civilized Tribes or of any other Indian tribe is sold to any State, county, or municipality for public-improvement purposes, or is acquired, under existing law, by any State, county, or municipality by condemnation or other proceedings for such public purposes, or is sold under existing law to any other person or corporation for other purposes, the money received for said land may, in the discretion and with the approval of the Secretary of the Interior, be reinvested in other lands selected by said Indian, and such land so selected and purchased shall be restricted as to alienation, lease, or incumbrance, and nontaxable in the same quantity and upon the same terms and conditions as the nontaxable lands from which the reinvested funds were derived, and such restrictions shall appear in the conveyance. Mar. 2, 1931, c. 374, 46 Stat. 1471; June 30, 1932, c. 333, 47 Stat. 474."

Originally, §409a applied only to the Five Civilized Tribes. 46 Stat. 1471. At the time the bill was introduced which amended §409a to include all Indians, the following explanation was given:

> "It is now in the Five Civilized Tribes in Oklahoma that lands can be condemned for water supply and other public purposes. It is the law in the Five Civilized Tribes that where land is sold the money derived from the sale can be used for buying other lands, and such other lands may be placed under restriction, and thereby exempt from taxes.
>
> "At Pawnee, Okla., outside of the Five Civilized Tribes, the Indian Department wants to secure some Indian lands for public purposes, and the bureau wants to take the money and buy other lands, so that such lands when purchased for Indians will be restricted and not be subject to taxation.
>
> "This measure extends the Five Civilized Tribes law relating to Indian lands to Indian tribes generally. It is a departmental bill and is an emergency matter." 75 Cong. Rec. 12319 (June 8, 1932) (remarks of Senator Thomas)

From the plain reading of §409a, which clearly states the restrictions shall appear

in the conveyance, and from this explanation, it would appear that tax exemption under §409a is dependent upon the land being placed under restrictions by the Secretary of the Interior.

Plaintiffs urge that Pourier v. Board of County Com'rs of Shannon Co., 83 S.D. 235, 157 N.W.2d 532, supports their claim of tax immunity, and they quote a clause from the opinion referring to an extension of this immunity to property purchased from the proceeds of sale or the increase (of livestock) or the exchange of property. At times, opinions include general statements that precede the determination of the issue presented, and they must be read as applied to that issue. In Pourier, plaintiffs were Oglala Sioux Indians who had received allotments and used them to buy cattle; they resided on the Pine Ridge Indian Reservation and the cattle were all maintained within the reservation. The court, clearly referring to that personal

property, stated the law applicable thereto as follows:

> "'Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress.'"

The requirement that the property be on a reservation excludes real estate outside its boundaries.

Expressly asserted, though woven through many of the plaintiffs' arguments, is the claim that as the original tract of land to which the United States held title in trust for allottee Nanette was then exempt from state taxation the proceeds from the sale thereof and later purchase of the Herrick lots therefrom continued this tax exemption. Johnson v. Board of Com'rs of Yankton County, 61 S.D. 372, 249 N.W. 683, an opinion not cited by either counsel, involved a similar situation and claim of the trust fund theory. There, Johnson was an incompetent World War veteran who was awarded compensation under

the World War Veterans' Act (38 U.S.C.A., §421 et seq). His sister as guardian received this compensation and used part of it to purchase real estate on which the veteran lived and was cared for by her. Taxes were levied on it by Yankton County, and application was made to abate them claiming, as in the case at bar, that as the compensation was exempt from taxation it was "in the nature of trust funds" used for the purchase of the real estate and it therefore was exempt from taxation under 38 U.S.C.A., §454. That section provided the compensation was not subject to claims of creditors and "shall be exempt from all taxation."

This court in the Johnson opinion on July 7, 1933, decided that even though the compensation was exempt from taxation the real estate purchased from it was not exempt. Later, when that same issue was presented to the United States Supreme Court, it came to the same conclusion.

Trotter v. Tennessee, December 4, 1933, 290 U.S. 354, 54 S.Ct. 138, 78 L.Ed. 358, and Lawrence v. Shaw, March 1, 1937, 300 U.S. 245, 57 S.Ct. 443, 81 L.Ed. 623, 108 A.L.R. 1102. The Lawrence opinion stated its holding in the Trotter appeal as "that land purchased by the guardian with such moneys (the tax exempt compensation received from the government as a World War veteran) was not exempt" from taxation.

In the Trotter opinion, Justice Cardozo, for a unanimous court, wrote:

> "Exemptions from taxation are not to be enlarged by implication if doubts are nicely balanced. * * * we think it very clear that there was an end to the exemption when they lost the quality of moneys and were converted into land and buildings."

See also United States v. Mummert, 8 Cir., 15 F.2d 926, and Work v. Mummert, 8 Cir. 29 F.2d 393.

Plaintiffs' claim of exemption under Article XXII of the South Dakota Constitution has no merit. It follows that the judgment

appealed from should be and is affirmed.

DUNN, Chief Justice, and WOLLMAN and DOYLE, Justices, concur.

WINANS, Justice, dissents.

BIEGELMEIR, Retired Justice, who at the time of oral argument was a member of the court, sitting for COLER, Justice, who was not a member of the court at the time this case was orally argued and did not participate.

WINANS, Justice (dissenting).

I would reverse the trial court. This case involves the sale of land held in trust by the United States for Indian beneficiaries and the subsequent purchase of new land with the proceeds of that sale. The issue in this case is whether the newly purchased land is impressed with the same trust as the original allotment so as to render it exempt from taxation. The circuit court ruled that the trust status of land is terminated by issuance of a patent in fee

simple. This holding was premised on 25 U.S.C.A. 349, which provides:

> "[T]he Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed."

Because title to the property in question was acquired by the Indian beneficiaries in fee simple, without notice of trust status or restrictions of any kind in the conveyance, the circuit court ruled the property became taxable under the laws of South Dakota, and that Gregory County properly levied taxes thereon.

The proceeds of the sale of the original trust allotment were held in trust by the United States. I hold that the use of these impressed proceeds to purchase new land in Gregory County caused the land so purchased

to likewise be trust impressed and immune from taxation by the state or its instrumentalities.

The facts and background of this dispute may be briefly stated. Petitioners, Nanette Leading Fighter and David Leading Fighter, are members of the Rosebud Sioux Indian Tribe. Nanette Leading Fighter was the original allottee of a certain parcel of trust land in Todd County, South Dakota, which was sold by the Rosebud Indian Agency on April 7, 1960. The proceeds of this sale were then held in trust. On or about June 28, 1960, $1,300 of these trust funds were used to purchase real property in the town of Herrick, Gregory County, South Dakota.

Petitioner's original allotment of land in Todd County, South Dakota was received from the United States of America.

The allotment was to be indefinitely held in trust for her by the United States acting as her trustee. Chap. 405, 25 Stat. 888, 25 U.S.C. §462, and Chap. 576, 48 Stat. 984, 25 U.S.C. §462. It is a long established rule that lands held in trust by the United States are immune from local taxation. As stated by this Court:

> "The state cannot tax Indian lands that are held in trust by the United States." Lebo v. Griffith, 42 S.D. 198, 173 N.W. 840.

See also the decision of the United States Supreme Court in United States v. Rickert, 188 U.S. 432, 23 S.Ct. 478, 47 L.Ed. 532.

On April 7, 1960 the trustee, United States, at Petitioner's request, sold the realty contained in her original allotment realizing $4,400 on this sale. This amount was deposited in Petitioner's individual Indian Money account at the Rosebud office

of the Bureau of Indian Affairs. Such accounts are controlled by the Secretary of the Interior or his representative who acts as an agent of the trustee United States. 25 C.F.R. §104.1. The trial court correctly recognized that the proceeds derived from the sale of Petitioner's trust land on deposit in her Individual Indian Money account were impressed with the same trust as the original allotment. They were, therefore, likewise immune from taxation by the state or its instrumentalities. The trial court found as an undisputed fact that:

> "Nanette Leading Fighter owned certain trust land which was sold by the Rosebud Indian Agency on April 7, 1960, and the proceeds of the sale were then held in trust."

A part of these trust funds were used to pruchase the real property in Herrick, Gregory County, South Dakota. It is this purchase which gives rise to the issue in the instant appeal, to-wit, whether the

newly obtained land purchased with funds held in trust is impressed with the same trust as those funds, so as to render it exempt from taxation. As previously stated, I would hold that the purchased land is so impressed and thus exempt from taxation. I base this holding on the well-settled trust principle enunciated in a long line of cases both in this state and in the federal system that the corpus of a trust does not lose its trust status by a change in form; instead, the corpus retains its status as long as it is traceable back to the original trust subject.

In Pourier v. Board of County Commissioners of Shannon County, 83 S.D. 235, 157 N.W.2d 532, we held that proceeds of a sale of personal property owned by an Indian, and acquired through investment of allotted funds and land, were federal instrumentalities and exempt from state taxation. The exemption extends to the proceeds of non-

taxable property and to property purchased with such proceeds. We held, and correctly I believe,

> "* * *this immunity extends to the increase of issue property, to property purchased from the proceeds of sale of the increase, or to property exchanged for similar use and increases therefrom so long as it can be traced and identified as such." Pourier v. Board of County Commissioners, supra, at p. 534.

Underlying this ruling is the basic policy consideration which has come to be known as the instrumentality doctrine. This doctrine asserts that, consistent with the Supremacy Clause of the United States Constitution, a state through taxation may neither "substantially impede or burden the functioning of the Federal Government." Federal Indian Law, 1958 Ed., p. 846. It is the policy of the federal government to cause to be exempt Indian trust property from state taxation to better enable Indians to remain self-sufficient. The trust property in the instant case is an instrument

of this policy and as the Pourier court correctly indicated, such instruments of the national government may not be taxed by the states.

While the Pourier decision concerned trust personalty, the instant case involves trust realty. No valid distinction can be drawn between the two types of trust property. The effect of the holding in Pourier, supra, on our decision in this case is in no way vitiated by the fact that a different class of property is involved. If anything, the rationale of the holding in that case can be more readily applied to the factual setting of the instant case. We stated in Pourier that the new property has the tax exempt trust status of the original "so long as it can be traced and identified as such." Stated otherwise, we held that as long as the new property is shown to be a derivative of the original trust allotment it is exempt. Because of the immobility of land and the

relative mobility of personal property it is substantially easier to trace realty, as in the instant case, than it is to trace personalty. The case at bar, therefore, falls within the ambit of the holding in Pourier.

Cases on this point decided in the federal system are consistent with our ruling in Pourier. In Dewey County, S.D. v. United States, 8 Cir., 26 F.2d 434, property issued by the federal government to Sioux Indians or derived from issue property was levied on by Dewey County. In language similar to that later used by this Court in Pourier, that court stated:

> "There seems to be no doubt that the property taxed was an instrumentality of the Government in carrying out its policy in behalf of these Indian wards. It belonged to the United States, whether in the original form in which it was issued or its increase, or property for which the property originally issued had been exchanged." at p. 435.

Perhaps the case which most clearly enunciates the doctrine of continuing trust

status for proceeds derived from trust land is Ward v. United States, 10 Cir., 139 F.2d 79. There facts strikingly similar to those present in the instant case were examined. Funds attained from the sale of a restricted allotment were held by the Secretary of the Interior. These funds were subsequently used to purchase new land. On the status of this land the court stated:

> "In substance, there was a mere conversion of trust property. The restricted allotment was converted into funds and the funds were converted into land. such land was charged with the same trust as the original allotment, under the well settled principle of the law of trusts that, whenever property in its original state and form has once been impressed with a trust, no change of that state and form can divest it of its trust character, so long as it remains capable of clear identification." at p. 82.

The instant case clearly fits within the rule stated by the Ward court, to-wit, so long as the trust property remains capable of clear identification, no change in form can divest

it of its trust character. Petitioner's property has remained capable of identification because funds from the allotment proceeds were used to purchase the property.

Each Indian allottee, pursuant to §11 of the Act of March 2, 1889 (Chap. 405, 25 Stat. 888), under which Petitioner received her allotment, received more than just land in trust. Each also received a vested right to a tax exemption for the land, the corpus of his trust. In Choate v. Trapp, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941, the state of Oklahoma sought to tax the allotments of local Indians during their trust periods. The state argued, inter alia, that allottees' tax exemption was a legislative gratuity and not a vested right, and could therefore be abrogated by an act of Congress. The United States Supreme Court disagreed and held that "[T]he provision that the land should be non-taxable was a property right, which

Congress undoubetedly had the power to grant." Choate, supra, 224 U.S. 665, 673. The decision went on to state that:

> "The patent issued in pursuance of those statutes gave the Indian as good a title to the exemption as it did to the land itself. Under the provisions of the Fifth Amendment there was no more power to deprive him of the exemption than of any other right in the property. * * * It is conceded that no right which was actually conferred on the Indians can be arbitrarily abrogated by statute." Choate, supra, at 673, 674.

The holding in Choate v. Trapp, supra, was clarified and reemphasized in Mahnomen County, Minnesota v. United States, 319 U.S. 474, 63 S.Ct. 1254, 87 L.Ed. 1527. The Supreme Court there recognized that even though the trustee United States might give its consent to taxation, the consent of the Indian allottee was necessary before his vested right to a tax exemption would be lost because" * * * under Choate v. Trapp the Indian, who has gained a 'vested right' not to be taxed, must also consent."

For purposes of this holding, it must be noted that the fact title to the land was not taken in a way to make its trust status known is not controlling because Indian beneficiaries should not be bound by the negligence of the Bureau of Indian Affairs. See Cramer v. United States, 261 U.S. 219,234, 43 S.Ct. 342,346, 67 L.Ed. 622,628; United States v. Forness, 125 F.2d 928,932-933 (2nd Cir., 1942, per Jerome Frank); and Sessions, Inc. v. Morton, 491 F.2d 854,857 (n.5).

I would hold that in the absence of clear evidence that Peitioner gave a knowing consent to the loss of her vested right to a tax exemption we should assume that she gave no such consent. She should not, therefore, lose her exemption because the Bureau of Indian Affairs failed to make the continuing trust character of the land known in the conveyance. This result flows from the application of several rules.

Congress has placed the burden of proof upon non-Indians in all trials concerning ownership of property. This was codified at 25 U.S.C. §194 which provides:

> "In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

Note 1, appended to this statute, clearly states the prupose of this section:

> "This section is evidence of the policy of the Government to give Indians the benefit of the doubt on questions of fact or construction of treaties or statutes relating to their welfare."

Certainly the issue of consent in this case is a question of fact which is ambiguous at best. Pursuant to the burden of proof enunciated in 25 U.S.C. §194, this Court must give Petitioner the benefit of the doubt as to this issue. That tax exemptions are to be strictly construed is a general rule of construction. The contrary rule, however,

follows:

> "Exemptions from taxation are not to be enlarged by implication if doubts are nicely balanced. Chicago Theological Seminary v. Illinois, 188 U.S. 662,674, 47 L.Ed. 641,649, 23 S.Ct. 386. On the other hand, they are not to be read so grudgingly as to thwart the purpose of the lawmakers." (emphasis supplied)

Sale of their allotted parcel and subsequent purchase of different land would mean loss of their tax exemption with the attendant risk of loss of their new land. Such a risk would clearly discourage those Indians who wish to live in the larger society outside the confines of the reservation. This, I believe, was not the intention of Congress in its Indian policy. Nor

do I believe this holding to be unfair to the larger society or that it poses any threat to our system of taxation.*

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* It is interesting to observe one effect of my holding as applied to this particular case. Upon sale by Petitioner, I would assume her original allotment of land worth $4,400 became taxable. Of that amount only $1,300 was reinvested. It can, therefore be assumed that due to this transaction $3,100 worth of additional land was added to South Dakota's tax base.

APPENDIX B

Judgment of the South Dakota Supreme Court

Filed May 9, 1975

File No. 11321 May 9th, 1975

IN THE SUPREME COURT)
)ss.
State of South Dakota)

Present: Chief Justice Francis G. Dunn, Associate Justices Fred R. Winans, Roger L. Wollman, and James M. Doyle and Retired Justice Frank Biegelmeier, who at the time of oral argument was a member of the Court, sitting for Justice Oren P. Coler who did not participate herein, of said Court, and the officers thereof:

NANNETTE LEADING FIGHTER)
and DAVID LEADING FIGHTER,)
)
Plaintiffs and)
Appellants,)
)
v.)
)
THE COUNTY OF GREGORY,)
a Political Subdivision of)
the State of South Dakota,)
)
Defendant and)
Respondent.)

This cause coming on to be heard on May 21st, 1974, at a term of this Court at the Supreme Court room in the City of Pierre, State of South Dakota, upon the merits of the cause and upon oral argument of counsel, and the Court having advised thereon and filed its decision in writing,

IT IS CONSIDERED, ORDERED AND ADJUDGED, that the Judgment of the Circuit Court, within and for Gregory County, appealed from herein, be and the same is hereby affirmed.

AND IT IS FURTHER ORDERED, that this cause be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

AND IT IS FURTHER ORDERED AND ADJUDGED that the Respondent have and recover of the Appellants costs and disbursements on this appeal, expended, taxed, and allowed at One Hundred Three and no/100**********Dollars.

/s/ Francis G. Dunn

Chief Justice

(SEAL)

Attest:

/s/ Lyman A. Melby

Clerk

By_____

Deputy Clerk

Supreme Court
State of South Dakota
Filed
May 9 1975
Lyman A. Melby
Clerk